Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

PETE Q. SALAS, Petitioner

V.

TONY E. GALLEGOS, CHAIRMAN,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. The United States Court of Appeals for the Fifth Circuit erred in affirming the district court's grant of summary judgment after finding that the plaintiff had established a prima facie case of age, gender and national origin discrimination.

2. Petitioner was erroneously denied admission of evidence at the trial court level which established age and national origin discrimination. The evidence stricken by the court was previously placed in the administrative record before the Commission and also, was made a part of the record before the trial court.

3. The affirmance by the Court of Appeals without any analysis or reasoning whatsoever was an abuse of discretion because the circuit court failed to address any of the issues advanced by appellant Salas including issues of significant conflicts of interest within the respondent agency.

4. The agency created an inherent and substantial conflict of interest by acting as both the respondent and the appellate authority at the administrative stages of this case.

LIST OF ALL PARTIES TO THE PROCEEDING

PETE Q. SALAS

Petitioner

TONY E. GALLEGOS, Chairman (including his predecessors and successors in office)
United States Equal Employment
Opportunity Commission
Respondent

SOLICITOR GENERAL
United States Department of Justice

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CITATION OF THE OPINIONS OF THE LOWER COURTS

Salas v. Gallegos, SA-92-CV-522. (Unpublished decision of the United States Court of Appeals for the Fifth Circuit)

Salas v. Gallegos, SA-92-CV-522. (Unpublished decision of the United States District Court for the Western District of Texas, San Antonio Division)

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court in invoked pursuant to Rule 10.1(a), 28 U.S.C. Rules of the Supreme Court.

(i) The judgment of the United States Court of Appeals for the Fifth Circuit in the case of Salas v. Gallegos was entered on June 20, 1995.

(ii) No rehearing was requested or obtained.

(iii) Petitioner does not expect a cross-petition or a Writ of Certiorari to be filed pursuant to Rule 12.3.

(iv) The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by Writ of Certiorari is 29 U.S.C. 623 and 42 U.S.C. 2000e-2.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5 U.S.C. 3311(1) (1993)

26 U.S.C. 621(1990)

42 U.S.C. 2000e

STATEMENT OF THE CASE

Petitioner Salas was one of six (6) applicants found to be best qualified for the Budget Analyst position announced by the San Antonio District Office of the Equal Employment Opportunity Commission (EEOC). All six (6) applicants were interviewed by the selecting official.

The selecting official was the administrative officer whose duties regularly included reviewing applications and preparing certificates of eligibility for all selections and who, as the supervisor of the unit in which the vacancy existed, was delegated the responsibility of making the selection in question. After conducting the interviews the selecting official selected a Hispanic female, age 41, for the position on June 23, 1986.

In doing so, the selecting official disregarded the extensive experience and education and superior qualifications of the petitioner ostensibly in lieu of each applicant's alleged performance during their

interview with him. Mr. Salas contends that this substitution of all objective criteria for totally subjective criteria was mere pretext calculated to mask unlawful discrimination against him. Additionally, Mr. Salas has contended throughout these proceedings that the selectee was not even minimally qualified under the agency's vacancy announcement.

The respondent's alleged non-discriminatory reasons for petitioner's non-selection varied substantially throughout the proceedings below.

The San Antonio District office has a history of discriminating against Hispanic males over the age of forty (40) years for new hire positions, as well as for terminating or coercing resignations from Hispanic in the protected age group. The EEOC's complaint examiner, however, would not permit these witnesses to testify on the petitioner's behalf about their knowledge of such discriminatory practices. Therefore, petitioner objected and obtained affidavits from these proposed witnesses, each of whom were past and current employees of the EEOC's San Antonio District Office and submitted

them with all the formalities required by the Commission's own regulations. A Bill of Exceptions was perfected before the respondent agency, when acting in its quasi-judicial role at the administrative stage of Salas' complaint.

Therefore, the E.E.O.C. was simultaneously the respondent, the trier of fact, and the appellate authority below. These conflicting roles created an impermissible conflict of interest that substantially deprived Mr. Salas of his right to a fair and impartial adjudication of his claims. It is for these reasons that petitioner complained that the use of complaint examiners by a federal agency should be limited to persons with no pecuniary or other interest in the federal agency being examined. In this case, the complaint examiner (a/k/a administrative judge) was dependent upon the respondent for the assignment of cases to be adjudicated or examined in return for fees for professional services rendered. This issue was not adjudicated by the courts below.

During the course of this litigation in federal district court below, Mr. Salas was able to obtain

some information through discovery about the San Antonio District Office's hiring and attrition numbers for the protected groups at issue, to wit: Hispanic males over forty (40) years of age. This information was summarized onto charts. These numbers show a clear pattern of discrimination for members within the protected groups. If the trial court had ordered the Commission to answer petitioner's discovery as fully as they should have, Mr. Salas would have been able to clearly show the gross statistical imbalance against persons within his protected group and the summary judgment motion would have been defeated. Accordingly, petitioner urges that this Court grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and following a review of the merits of this case, reverse the judgment of the United States Court of Appeals for the Fifth Circuit and order that this cause be remanded to the trial court for further pre-trial development.

Federal question jurisdiction in the Fifth Circuit Appellate Court was based upon Title VII, 28 U.S.C. 2000e-2 and Age Discrimination in Employment

Act ("ADEA"), 29 U.S.C. 623.

ARGUMENT

I. The United States Court of Appeals for the Fifth Circuit erred in affirming the district court's grant of summary judgment after finding that the plaintiff had established a prima facie case of age, gender and national origin discrimination.

Mr. Salas submitted affidavits as evidence that the San Antonio District Office of the E.E.O.C. had a history of discriminating against older Hispanic males. The lower court struck them apparently because they did not state that each was made under penalty of perjury and/or based upon each witnesses personal knowledge.

This ruling however, should have been considered error by the Court of Appeals because the district judge failed to address the fact that each

"Witness Statement Affidavit" was proven up under penalty of perjury by way of a Bill of Exceptions at the administrative hearing stage of this case. Additionally, each affidavit clearly stated that the declarant was "attest[ing]" to the facts stated therein and then proceeded to articulate specific facts within each witnesses' personal knowledge. These were not conclusatory statements but rather specific facts upon which each affiant based his statement. Compare Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1305-06 (5th Cir. 1988).

In point of fact it was the respondent commission's failure or refusal to consider these Witness Statement Affidavits as a bill of exception to and therefore as part of the hearing record that forms the basis of Mr. Salas complaints about the commission having an inherent conflict of interest when it hires complaint examiners on a contract basis to adjudicate discrimination claims by its own employees. Additionally the authenticating affidavits of both Salas and his counsel prove up or authenticate these Witness Statement Affidavits as "true and correct copies of the originals" that were

submitted via a Bill of Exceptions at the administrative hearing. Further, the Witness Statement Affidavits that were submitted as controverting affidavits by Salas were the same statements that had been produced by the commission. Accordingly, their authenticity and reliability had already been established.

II. Petitioner was erroneously denied admission of evidence at the trial court level which established age and national origin discrimination. The evidence stricken by the court was previously placed in the administrative record before the Commission and also, was made a part of the record before the trial court.

Motions for summary judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure permit the Court to resolve lawsuits without the necessity of trials if there are no genuine issues as to any facts which are material and the moving party is entitled to judgment as a matter of law.

See Federal Rules of Civil Procedure 56(e); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cir. 1991); Lavespere v. Niagara Machine and Tool Works, Inc. 910 F.2d 167, 1977-78 (5th Cir. 1990), rehearing denied, 920 F.2d 259 (5th Cir. 1990); and Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987). See also Orthopedic and Sports Injury Clinic v. Wang, 922 F.2d 220, 225 (5th Cir. 1991) (holding that unsupporting affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to either support or defeat a motion for summary judgment. Summary judgment is inappropriate; however if, as in this case, the pleadings, administrative hearing transcripts, depositions, answers to interrogatories, and admissions on file, together with affidavits, show genuine issues as to many material facts. Hanks v. Transcontinental Gas Pipeline Corp.,953 F.2d 996, 997 (5th Cir. 1992).

(1) Movant's Burden

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary

materials that there is no genuine dispute as to any facts material to resolution of the motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4 106 S.Ct. 2505, 2511 n.2, 91 L.Ed.2d 265 (1986); Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992); Slaughter v. Southern Talc Co., 494 F.2d 167, 170 (5th Cir. 1991); Fields v. City of South Houston, Texas; Lavespere v. Niagara Machine and Tool Works; Isquith v. Middlesouth Utilities, Inc., 847 F.2d 186, 198 (5th Cir. 1988); and Fontenot v. Upjohn Company, 780 F.2d 1190, 1994 (5th Cir. 1986). Although respondent claims there are no genuine disputes as to material facts, the evidence when viewed in light of the controverting evidence made part of the record below clearly shows otherwise.

(2) Numerous Genuine Material Factual Issues Were Raised in the Respondent Commission's Own Supporting Documents

In order for the courts below to find that there were no genuine material factual issues, the Court must be satisfied that no reasonable trier of

fact could have found for the non-moving party or, in other words, that the evidence favoring the non-moving party is insufficient to enable a reasonable jury to return a verdict for the non-movant. See Anderson v. Liberty Lobby, Inc.; Mathsushida Electrical Industrial Company, Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); Lavespere v. Niagara Machine and Tool Works; Bache v. American Telephone and Telegraph Company, 840 F.2d 283, 287 (5th Cir. 1988); and Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988). To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the non-moving party's claims or defense; or, if the crucial issue is one for which the non-moving party would bear the burden of proof at trial, point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the non-moving party's claim or defense. See Celotex Corp. v. Catrett; Little v. Liquid Air Corp.; Laverspere v. Niagara Machine and Tool Works; Isquith v. Middlesouth Utilities, Inc.; and Fontenot

v. Upjohn Company. In this case, the evidentiary documents submitted by respondent in support of his motion show numerous material fact issues. These are factual issues apparent in respondent's own submission; that is, without even counting those urged by the petitioner in his opposition to the motion.

(3) Non-movant's Burden

Although, petitioner contends that the respondent did not meet his burden for summary disposition, even if, in arguendo, it is assumed that he had, then the burden would shift to the non-moving party to show that summary judgment is not appropriate. The non-moving party cannot discharge this burden by referring to the mere allegations, or denial of the non-moving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue as to a material fact exists. See Celotex Corp. v. Catrett; Fields v. City of South Houston, Texas; Laverspere v. Niagara Machine and Tool Works; Isquith v.

Middlesouth Utilities, Inc.; Anderson v. Liberty Lobby, Inc.; Hanks v. Transcontinental Gas Pipeline Corp.

The party opposing a motion supported by evidence cannot discharge his burden by alleging mere legal conclusions; instead, he must present affirmative evidence in order to defeat a properly supported motion for summary judgment. See Anderson v. Liberty Lobby, Inc.; Hanks v. Transcontinental Gas Pipeline Company; Lachuga v. Southern Pacific Transportation Company, 949 F.2d at 794; and Fontenot v. Upjohn Company. See also Resolution Trust Corporation v. Camp, 965 F.2d 25, 29 (5th Cir. 1992) (holding that a party opposing summary judgment must do more than merely suggest possible error in the movant's summary judgment evidence). Petitioner Salas respectfully urges that he did in fact demonstrate this and the lower courts erred in disregarding it.

Prima Facie Cases of Age Discrimination and National Origin Discrimination Against Hispanics Were Established.

In the respondent/appellee's Motion for Summary Judgment, the Commission appeared to be under the

mistaken impression that petitioner could not make out a prima facie case because the selectee was also an Hispanic (Mexican American). This however simply does not comport with reality or case law. See De Volld v. Bailar, 568 F.2d 1162 (5th Cir. 1978) rehearing denied, 570 F.2d 1391 (5th Cir. 1978); Alexander v. Frank, 777 F.Supp 516 (N.D. Tex. 1991). Although the Court of Appeals in this case recognized that the trial court had erred in finding that, as a matter of law, the promotion of another Mexican-American to the challenged position precluded the petitioner from establishing a prima facie case of discrimination. Id. The appeals court did not overturn the district court's decision. In Djaz this Court held that "to preclude a petitioner from recovery in all cases in which the challenged position is filled by a member of the same protected class, we would have to assume that Title VII protects only group rights." id at 1360. Title VII was not designed only to deter and remedy discrimination on the basis of group characteristics and to remove barriers that favor certain groups over others, but also to protect individuals, as

well as groups, from discrimination on the basis of group characteristics. Diaz at 1360, citing to Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 852-53, 28 L.Ed.2d 158 (1971).

Mr. Salas put forth more than sufficient evidence through the deposition excerpts, discovery responses, affidavits and documentary exhibits attached to his response to the Motion for Summary Judgment below to establish genuine issues of material fact. This would be so even if it appeared, in arguendo, that the non-mover was unlikely to prevail at trial or that the mover's facts appeared more plausible; because these are not reasons to grant summary judgment. Hayden v. First National Bank, 595 F.2d 994, 997 (5th Cir. 1979). Genuine issues of fact as to the employer's motive and intent should always be developed and decided by the fact finder at a trial on the merits. Jones v. Western Geophysical Company of America, 669 F.2d 280, 284 (5th Cir. 1982). Great weight should be given to the petitioner's evidence before he is denied the right to a trial de novo in which not only will his evidence be heard but also where he

will be accorded the right to cross-examine the respondent's witnesses.

Further, the fact that the selecting official (Limon) as well as the concurring official (Esquivel) were Hispanics is of no help to the Commission. The fact of the matter is, that the case law is replete with instances of blatantly unlawful discrimination having been perpetrated by persons within the aggrieved person's same ethnic or other protected group. The respondent/appellee based this mistaken belief on case law which is wholly inapplicable to the facts in the case at bar. For example, the plaintiff in St. Mary's Honor Center was a victim of a campaign initiated by his immediate supervisors with the intention of firing the plaintiff. St. Mary's Honor Center, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The immediate supervisors in St. Mary's Honor Center were both white, unlike the facts in the case at bar. Id.

In establishing the petitioner's claim, Mr. Salas had the burden of proving at trial by preponderance of the evidence, that race, gender or national origin were substantial motivating factors

affecting his non-selection for the position of budget analyst. See Transworld Airlines, Inc. v. Thurston, 469 US 111 (1985); Loeb v. Textron, Inc., 1003, 1014 (1st Cir. 1979). See also United States Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 1481 (1981). It was not, however, incumbent upon him to prove this in a response to a motion for summary judgment.

The circumstantial evidence needed to prove a prima facie case varies depending on the nature of the employment practice or policy at issue. In the case of McDonnell Douglas Corp v. Green, 411 US 792 (1973) (Title VII case), the court allowed the plaintiff to go forward in a non-selection case by showing:

(1) that he belonged to a protected group;

(2) that he applied and was qualified for a job for which the employer was seeking applicants;

(3) despite those qualifications, he was rejected;

(4) after that rejection, the position remained open, and the employer continued to seek applicants with similar qualifications.

The controverting evidence submitted by petitioner clearly shows that petitioner Salas established a prima facie case of discrimination against Hispanic males over forty (40) years of age. McDonnell Douglas Corp, at 798. See also United States Postal Service Board of Governors v. Aikens.

The EEOC's own employee, Oscar R. Garza, (who was also employed at the time the non-selection took place) shows that respondent's selecting official, Alfred Limon, proffered conflicting alleged non-discriminatory reasons for his selection of Ms. Cavazos at different points in time.

Evidence showing that management favored younger white or non-Hispanics would suffice to complete a prima facie case. See Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (D.C. Cir. 1983), cert. denied, 104 S.Ct 488 (1983).

In meeting its burden of going forward, the employer must articulate a legitimate non-discriminatory reason for its practice or policy. The articulation must be done through admissible evidence, be sufficiently clear and specific to enable the petitioner to attempt rebuttal, and be

credible enough to warrant judgment for the respondent if unrebutted by the petitioner who at all times retains the burden of persuasion. See Davis v. Combustion Engineering Inc., 742 F.2d 916 (6th Cir. 1984); McCorstin v. U.S. Steel Corp., 621 F.2d 749 (5th Cir. 1980); McCuen v. Home Ins. Co., 633 F.2d 1150 (5th Cir. 1981).

Once the employer has articulated a legitimate, non-discriminatory reason for adversely affecting the petitioner, the burden of going forward shifts back to the petitioner to prove pretext. The petitioner may meet that burden in the ultimate burden of persuasion "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." See Texas Dept. of Community Affairs v. Burdine, 451 U.S. 248 (1981).

The controverting evidence submitted by Mr. Salas with his Response to the Defendant's Motion for Summary Judgment, was substantial, probative evidence, of discrimination by respondent's agents, especially Alfred Limon, against petitioner and a

pattern of such discrimination against older Hispanic males in general. See Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cir. 1991); Laverspere v. Niagara Machine and Tool Works, 910 F.2d 167, 178 (5th Cir. 1990); Isquith v. Middlesouth Utilities, Inc., 847 F.2d 186, 198 (5th Cir. 1988). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4 106 S.Ct. 2505, at 2510-11 n.2, 91 L.Ed.2d 265 (1986); Hanks v. Transcontinental Gas Pipeline Corp.,953 F.2d 996, 997 (5th Cir. 1992). The evidence may have been all the more compelling had the district court compelled the agency to answer petitioner's discovery more fully. Nonetheless, sufficient evidence to prevent summary disposition was provided by petitioner.

Petitioner developed substantial, credible, probative evidence in support of his theory of discrimination. Therefore, the courts below should have found that petitioner's claims of national origin discrimination were simply beyond the reach of respondent's motion for summary judgment. See

Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cir. 1991); Laverspere v. Niagara Machine and Tool Works, 910 F.2d 167, 178 (5th Cir. 1990); Isquith v. Middlesouth Utilities, Inc., 847 F.2d 186, 198 (5th Cir. 1988). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4 106 S.Ct. 2505, at 2510-11 n.2, 91 L.Ed.2d 265 (1986); Hanks v. Transcontinental Gas Pipeline Corp.,953 F.2d 996, 997 (5th Cir. 1992).

The Agency's Alleged Legitimate Non-discriminatory Reason for Non-selecting Petitioner Salas Was Mere Pretext Calculated to Mask Unlawful Discrimination

A plaintiff can establish a prima facie case of discrimination "by showing merely that (1) he was within the protected class, (2) that he was qualified for the job in question, and (3) that employees outside of the protected class were more favorably treated--for example, by being hired to a job for which the petitioner was turned down or by replacing the plaintiff in the job from which the plaintiff was discharged." McDonnell Douglas Corp.,

411 U.S. at 802.; Price v. Maryland Casualty Co., 561 F.2d 609, 612 (5th Cir. 1977). The third element of the test has been modified due to the arbitrary nature of the class distinction in age discrimination cases. In Wilson v. Sealtest Foods Div. of Kraftco Corp., 501 F.2d 84, 86 (5th Cir. 1974), the court overturned a directed verdict in favor of the employer, even though the plaintiff was replaced simply by someone younger, not by someone outside of the protected ADEA class.

Because the discrimination involves age, rather than sex or race, a requirement that the replacement be from a non-protected group fails to take the reality of the working place into account.

Because of the value of experience rarely are sixty-year-olds replaced by those under forty. The replacement process is more subtle but just as injurious to the worker who has been discharged. That the person is replaced by a person ten years younger rather than twenty years does not diminish the discrimination; the subtlety only tends to disguise it. McCorstin, 621 F.2d at 754; see also McCuen, 633 F.2d at 1151- 52, (summary judgment

reversed even though the younger employees who were retained were over forty years of age).

In the Commission's motion for summary judgment, the respondent conceded that petitioner Salas had made out a prima facie case for age discrimination. (Defendant's Motion to Dismiss for Summary Judgment at page 13). When a prima facie case of age discrimination is established, it creates a rebuttable presumption that the employer has unlawfully discriminated. Thornbrough v. Columbus and Greenville R. C., 760 F.2d 633, 639 (5th Cir. 1985). In addition, when a prima facie case has been established, the burden of production shifts to the employer. To overcome the presumption of intentional discrimination created by the establishment of a prima facie case, the employer must articulate a legitimate, nondiscriminatory reason for rejecting the plaintiff and selecting someone else. If he does not so rebut, the presumption when, as here, is it is corroborated by some direct evidence of discrimination, requires the fact finder to find for the plaintiff. Id.

The respondent claims the reason the petitioner

was not hired was due to his poor performance during the interview stage and not age or any other type of discrimination. Accordingly, this is the only alleged legitimate, nondiscriminatory reason on which the respondent should be permitted to rely for its refusal to hire Mr. Salas and instead give the position to a younger female employee. This, however, was not the case here. Rather, Mr. Limon gave several different, irreconcilable reasons for petitioner's non-selection at virtually each stage of this case. If any reason is considered to be legitimate and nondiscriminatory then the burden of production shifts back to the petitioner to prove that the proffered reason was merely pretext. Moore v. Eli Lilly and Co., 802 F.Supp. 1468, 1471 (N.D. Tex. 1992), aff'd, 990 F.2d 812 (5th 1993), reh'g denied, 993 F.2d 1545 (5th Cir. 1993), cert. denied 114 S.Ct. 457 (1994). Petitioner has shown, however, that none of the reasons proffered by Mr. Limon are worthy of belief.

The plaintiff can prove the employer's articulated reasons are pretext "in two ways, either [1] directly by persuading the court that a

discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence.' " Thornbrough 750 F.2d at 639 (quoting Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207, 217 (1981)).

Petitioner respectfully urges that these statements alone should have been sufficient to allow his claim to be heard before a jury. Petitioner Salas however, provided the trial court with much more. For example, Mr. Oscar Garza testified under oath at the hearing during the administrative proceedings, as well as at his deposition that he had two separate meetings with Mr. Limon. During the first meeting Mr. Limon told Mr. Garza that Mr. Salas did not receive the budget analyst position because "Mr. Salas had lied on his application form." Then, during a second meeting a nervous Mr. Limon told Mr. Garza that the petitioner was not given the promotion because of an allegedly "bad interview." Such contradictory testimony becomes an issue of credibility to be decided by the

trier of fact, and should be enough to create a genuine issue of material fact. The Court of Appeals construed this as adding another reason justifying the non-selection of Mr. Salas without any analysis whatsoever.

In the context of summary judgment or directed verdict, the question is not whether the plaintiff proves pretext, but rather whether the plaintiff raises a genuine issue of fact regarding pretext. Burdine, 450 U.S. at 256. The conflicting testimony of the petitioner and Mr. Limon as well as the affidavits of other workers who were employed in the office at the time should be sufficient to create a genuine issue of material fact and as such survive summary judgment.

The Hiring Policies and Practices of the San Antonio District Office of the EEOC Were Discriminatory

It is the contention of the petitioner that the hiring policies of the San Antonio District office of the EEOC shows a history of age discrimination. One of the factors which should have been considered by the trial court were the subjective hiring policies of the San Antonio office. Specifically,

Mr. Limon was the sole person responsible for announcing the position vacancy, receiving the applications, reviewing the applications, and ascribing to each application the points to determine the list of applicants to be interviewed. Mr. Limon also served as the sole person who interviewed the applicants and recommended his choice to his superiors.

Although the applications themselves were of an objective nature, the procedures employed by the San Antonio office of the EEOC were purely subjective. The courts have previously held that subjective factors, particularly involving the evaluation of professional employees, may be considered by an employer in making its decisions. See Wilkins v. University of Houston, 654 F.2d at 401; Page, 726 F.2d at 1046 (promotional system based upon subjective selection criteria not necessarily discriminatory).

Subjective hiring policies may not necessarily be discriminatory, but such policies are probative evidence of discrimination if the plaintiff can show that the policy has a disparate effect on a

protected group. Harper v. Trans World Airlines, Inc., 525 F.2d 409 (8th Cir. 1975). A plaintiff can establish a discriminatory effect on a protected class through the use of statistics alone. Robinson v. City of Dallas, 514 F.2d 1271 (5th Cir. 1975). Mr. Salas sought to establish such an effect through the use of witness testimony as well as through the use of statistics of older Hispanic males. Petitioner contends that had he been permitted to compel full compliance with his discovery requests he could have shown that the San Antonio District Office fails to hire and also discharges Hispanic male employees in grossly disproportionate percentages than others not in these protected groups.

Additionally, the respondent agency fails or refuses to understand that in these cases, and others, the government agencies being sued had some type of panel or review board which made the final selections. Then, these decisions were subject to external review by an adjudicatory agency - which is usually the EEOC. See Frank v. Odom, 3 F.3d 839, (5th Cir. September 24, 1993) (NO. 92-1216); Farias

v. Bexar County Bd. of Trustees for Mental Health Mental Retardation Services, 925 F.2d 866, (5th Cir. 1991). This, however, is not how EEOC does it when its own decisions are challenged. It is difficult to understand how the agency whose sole mission is protecting employees from violations governed by the ADEA, Title VII and other discrimination statutes, does not have the same type of safeguards as other government agencies which use groups of people or panels to make employment decisions rather than just one person.

Another factor that establishes a discriminatory employment policy existed at the San Antonio EEOC office was the method used in determining the qualifications of the applicants. Comparing the different qualifications of the selectee, Ms. Cavazos, and Mr. Salas, there is such a gross disparity between the two applicants as to create a genuine issue of material fact which should preclude summary judgment. While it is not for this Court or the lower courts to decide on summary judgment the issue of who was best qualified, evidence that the petitioner was clearly best

qualified would be one way of showing that the employer's explanation is a pretext. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 813-814 (5th Cir. 1991).

According to Ms. Cavazos' Deposition she had a high school diploma and a two college credits that she earned in 1970. Ms. Cavazos also had nine (9) years of experience in government work which purportedly included two (2) years of budget work with the Department of Housing and Urban Development. She also allegedly had eleven (11) years of experience as a bookkeeper in the private sector. Ms. Cavazos entered the application process for the budget analyst position with a GS-5 rating.

Mr. Salas' qualifications were far superior to those of Ms. Cavazos. He received a Bachelor of Arts Degree from St. Mary's University in San Antonio, as well as professional licensure in social work, Licensed Master Social Worker (LMSW). Included in this degree program, were several classes which pertained specifically to the budget analyst position. Although the budget analyst position was offered to those persons with at least

a GS-5 rating, Mr. Salas was rated up to a GS-13 when the position in question became available. In fact Mr. Limon stated, during the administrative hearings, that of all the applicants, Mr. Salas was the only one rated to the GS-9 level.

Perhaps the qualification that stands out above all others, however, is Mr. Salas' twenty-six (26) years of experience in the area of budget analysis, planning and management.

An Impermissible Conflict of Interest Existed Between the E.E.O.C. and (Contract-based) Complaints Examiner (a/k/a Administrative Judge) that Heard This Case at the Administrative Stage and Excluded the Testimony of the Current and Former E.E.O.C. Investigators of the San Antonio District Office who offered to Testify on Salas' Behalf

There was one other qualification held by Mr. Salas which deserves attention because the selecting official, Mr. Limon, refused to consider it in the application process. Mr. Limon did not apply the military preference points available through 5 U.S.C. §3311(1).

Petitioner does not argue that this section of the United States Code gives him an "unconditional preference" to the promotion over the other

applicants. See Crowley v. U.S., 527 F.2d 1176, (Ct.Cl. 1975) (belief that veterans are entitled to an unconditional preference in promotions was misplaced.) Instead, Mr. Salas argues that 5 U.S.C. §3311 allows his veteran status to be credited to his application not unlike any other merit. Rather than an unconditional right to selection, this qualification should have been awarded points based on the promotional system of the EEOC (or OPM [Office of Personnel Management]) just as the merits given to other qualifications such as writing ability and experience.

The Commission argues that qualifications must be so disparate as to "virtually jump off the page and slap the court in the face", and that is precisely what they do in the case at bar. Odom v. Frank, 3 F.3d 839, (5th Cir. September 24, 1993). It is noteworthy that even the Odom case, which the respondent agency seemed to place a great deal of reliance upon, found that "when a clearly better qualified applicant has been passed over for a position, in favor of a less qualified person, a finding of pretext masking discrimination can be

supported." Id. at 843.

The petitioner should therefore have the right to prove before the trier of fact that his qualifications show he was much more qualified than Ms. Cavazos. The petitioner's response to the respondent's motion for summary judgment should be evaluated based on the reasoning in Thornbrough. In Thornbrough, the plaintiff was prepared to present witnesses that would have testified as to his qualifications and abilities. In addition, had the case continued, Thornbrough could have cross-examined the retained and new employees about their qualifications. Through this comparison of his qualifications with those of his "competitors," Thornbrough may have been able to persuade the fact finder that he was the clearly superior employee. See Thornbrough 750 F.2d at 646; Causey v. Ford Motor Co., 516 F.2d 416, 423 (5th Cir. 1975) (where employer alleges that he hired one employee rather than another because, in his subjective view, the chosen employee was better qualified; the court should scrutinize this explanation very carefully); Pond v. Braniff Airways, Inc., 500 F.2d 161, 166

(5th Cir. 1974). Thornbrough 750 F.2d at 646. There is no question that the petitioner, in the case at bar, can demonstrate he was the best qualified candidate for the budget analyst position. This is not to say however, that the courts have a duty to replace the business judgments of competent employers who have years of experience in the field of judging applicants. See Odom 3 F.3d at 843. But that judgment must be tempered with reality. When a plaintiff can show some disparity (not to mention the egregious disparity at issue here) in the qualifications of the two applicants, then the plaintiff should be able to get to the jury on the question of qualifications. Burdine, 450 U.S. at 259, (fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this [evidence] may be probative of whether the employer's reasons are pretext for discrimination).

Mr. Salas has shown that he established a prima facie case of age discrimination; that fact is not disputed by the respondent. Mr. Salas also

established through deposition testimony, affidavits, discovery responses and documentary exhibits that the allegedly legitimate, nondiscriminatory reason(s) given by the respondent's agent were pure unadulterated pretextual fabrications.

A Prima Facie Case of Gender Discrimination Was Established

To prove a prima facie case of gender discrimination, the plaintiff has the burden of showing that: (1) he belongs to a protected class; (2) he was qualified to do her job; (3) despite his qualifications, his employment situation was adversely affected; (4) his position was filled by someone of the opposite sex, or members of the opposite sex were treated differently in the terms and conditions of their employment. McDonnell Douglas Corp., 411 U.S. at 802. Mr. Salas clearly falls within the guidelines as set out in the *McDonnell Douglas test*. Because Mr. Salas' claim is one of disparate treatment, by the employer, intent may be proved by direct or circumstantial evidence. Walls v. Mississippi State Department of Public

Welfare, 730 F.2d 306, 321-22 (5th Cir.1984). The evidence of record, which has been cited here and/or in petitioner's response, clearly shows summary judgment is completely inappropriate, however here, a lawsuit that turns on numerous disputed questions of material facts. E.E.O.C. v. Brown & Root Inc., 688 F.2d 338, 339 (5th Cir. 1982).

CONCLUSION

Petitioner Salas is a Hispanic male, was 59 years old at the time, he and 20 other persons applied for a position of Budget Analyst, GS 5/7/9.

It is undisputed that Mr. Salas along with five (5) others were listed as the best qualified and called in by the selecting official for an interview. Mr. Salas was interviewed but not selected. A female candidate, Virginia Cavazos, whom was not even minimally qualified, was selected on June 23, 1986. The selectee was a 41 year old Hispanic; however, the substantial disparity between their ages nevertheless establishes a prima facie case of discrimination based upon the following: (a) age, over 59 at the time (b) gender (male), and

(c) national origin (Hispanic).

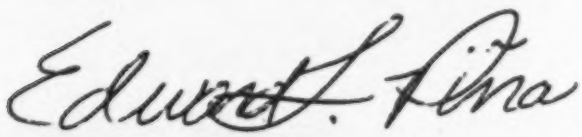
The respondent contended at the administrative stages below that there was a legitimate, non-discriminatory reason for Mr. Salas' non-selection; specifically that the selectee, Victoria Cavazos, *interviewed better* than the petitioner.

Petitioner Salas demonstrated by clear and competent evidence that the respondent agency overlooked his education, extensive budget experience, analytical experience and other job-related achievements and experience dating back to 1947. The Commission's disregard of all objective measures in lieu an interview, under these circumstances constituted a material fact question as to the reason or reasons for his non-selection. Mr. Salas' efforts to collect the data necessary to show a pattern of gross statistical disparities between applicants in the protected group and those outside said group were denied by the lower courts. Accordingly, the decision of the United States Court of Appeals for the Fifth Circuit affirming the trial court's granting of summary judgment should be reversed and this cause remanded to the trial court

for further pre-trial development or trial.

For the foregoing reasons, Petitioner respectfully requests that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

PETE Q. SALAS, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. SA 92-CA-0522
TONY E. GALLEGOS, Chairman, Equal Employment Opportunity Commission,	)	

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

On this date the Court considered the Defendants Motion to Dismiss and for Summary Judgment, filed October 15, 1993; the Plaintiff's Response and Plaintiff's Motion to Strike, filed December 10, 1993; and the Defendant's Reply, filed January 28, 1994. The Court has carefully considered the motions and the argument of the parties and for the reasons set forth herein finds that the motion for summary judgment shall be granted.

Facts and Procedural History

This is a suit for employment discrimination. on May 1, 1986, the plaintiff, Pete Q. Salas,

applied for the position of Budget Analyst in the San Antonio District Office of the Equal Employment Opportunity Commission (EEOC) in response to Vacancy Announcement Number SADO-09-86. There were twenty-one applicants for the position. Alfred Limon, Administrative officer and Personnel Management Specialist for the San Antonio District Office, reviewed the applications and assigned point values to each applicant's experience, in accordance with the EEOC's crediting
plan for the Budget Analyst position. After evaluating the applications and assigning the point values, Limon placed six of the applicants, including the Salas and Victoria Cavazos, on the Certificates of Eligibles. Cavazos is an Hispanic female, and was over the age of 40 years at the time she applied for the position.

Salas was certified for the Budget Analyst position at the GS-5, GS-7, and GS-9 levels. Salas possesses a Bachelor of Arts degree in sociology from St. Mary's University, and a professional certification in social Cavazos was certified at the GS-5 level only.

Cavazos had prior work experience at the Department of Housing and Urban Development dealing with matters related to the functions of a Budget Analyst. She had eleven years of bookkeeping experience in the private sector and had taken a number of college courses at San Antonio College, including two college accounting courses. She did not have a bachelor's degree.

Both Salas and Cavazos were interviewed for position. Limon prepared specific questions focusing on the needs of the Budget Analyst position in preparation for conducting interviews with the eligible candidates. Salas' interview with Limon did not go well. on the other hand, Cavazos' interview went very well. Limon testified that during the interview Salas wandered off the subject and volunteered extraneous information not relevant to the questions asked of him. Limon also testified that Salas' interview lasted the longest because Limon had to spend a lot of time trying to get Salas back on the subject.

After conducting the interviews, Limon recommended to Pedro Esquivel, Director of the San

Antonio District office, that Cavazos be hired for the position. Esquivel concurred in Limon's recommendation and the position of Budget Analyst was given to Cavazos.

After unsuccessfully pursuing his administrative remedies, Salas filed suit pursuant to Title VII and the ADEA, alleging that he had been discriminated against on the basis of gender (male), national origin (Hispanic), and age (59). He also alleged that the EEOC had denied his veterans preference and reemployment rights in failing to select him.

Summary Judgment Standard

The standard to be applied in deciding a motion for summary judgment is set forth in Fed. R. Civ. P. 56, which provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56 (c) See also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986) ; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.4 (1986);

and Fields v. City of South Houston, Texas, 922 F.2d 1183, 1187 (5th Cir. 1991).

With respect to summary judgment evidence, Fed. R. Civ. P.56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Thus, summary judgment motions permit the Court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any facts which are material and the moving party is entitled to judgment as a matter of law. See Fields, 922 F.2d at 1187.

Summary Judgment Evidence.

Before addressing the substance of the EEOC's motion for summary judgment, the Court will first address Salas' motion to strike. Salas seeks to strike the EEOC's exhibit G-3 (the transcript of the administrative hearing), on the grounds that Cynthia Matthews, who authenticated the transcript, is not

qualified to do so because she did not have personal knowledge of the documents. However, Matthews is the custodian of the records for EEOC administrative complaints and therefore is the proper person to authenticate those records. See Fed. R. Evid. 803(6). See also, United States v. Jones, 554 F.2d 251, 252 (5th Cir. 1977) cert. denied, 434 U.S. 866 (1977); Wilson v. Zapata Offshore, 939 F.2d 260, 272 (5th Cir. 1991).

In addition, Salas argues that the EEOC's Exhibit G-3 should be stricken "for lack of completeness" pursuant to Rule 106 of the Federal Rules of Evidence. Salas fails to indicate in what way Exhibit G-3 is incomplete, and further, even if it was incomplete, his remedy would be to offer the missing portions, not to strike those offered by the opposing side.[1] The Court finds that Salas'

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[1] Rule 106 provides as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

motion to strike is without merit and it will be denied.

The Court also finds, however, that certain evidence submitted by Salas in response to the motion for summary judgment is improper. Salas attempts to bolster his claims for age and, national origin discrimination by submitting several "affidavits", Salas' Exhibits 5-10, that ostensibly show that the San Antonio District office of the EEOC had a history of discriminating against older Hispanic males. The EEOC objects to these affidavits, arguing that they are not proper summary judgment evidence. The Court agrees with the EEOC. These "affidavits" are neither sworn nor declared to be true under penalty of perjury and therefore will be disregarded as summary judgment proof. Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1305-06 (5th Cir. 1988).

Likewise Salas' Exhibit 3L, which is a chart purporting to show some type of analysis of gender, ethnicity, GS-grade level, and age statistics, will not be considered. This chart is improper summary judgment evidence because there is no indication of

who prepared the chart, when it was prepared, on what information it is based, or any other indicia of reliability or relevancy.

National Origin Discrimination

In order to make out a prima facie case of national origin discrimination, a plaintiff must show that: (1) he belongs to a protected class; (2) he applied for a position for which he was qualified; (3) despite his qualifications, he did not--receive the position; and (4) the position was filled by someone outside of the protected class. Young v. City of Houston, 906 F.2d 177, 180 (5th Cir. 1990). Once the plaintiff proves a prima facie case, the burden shifts to the defendant to "articulate legitimate, nondiscriminatory reasons for its actions." Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981). If the defendant satisfies this burden, then plaintiff must prove by a preponderance of the evidence that the defendant's articulated reasons for its actions were a pretext for illegal discrimination. Moham v. Steego Corp., 3 F.3d 873, 875 (5th Cir. 1993) cert. denied, 114 S.Ct. 1307 (1994). The ultimate burden

of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. Id.

The undisputed summary judgment evidence establishes that both Salas and Cavazos were Hispanic and therefore members of the same protected class in this case. Because the actual selectee was also a member of the protected class, Salas has failed to make out a prima facie case of national origin discrimination and the EEOC is entitled to judgment as a matter of law on this claim.

Age Discrimination

In order to make out a prima facie case of age discrimination on a failure to hire claim a plaintiff is required to show that: (1) he is within the protected class and was adversely affected; (2) he applied for a position for which he was qualified; and (4) the job remained open or was filled by someone younger. Lindsey v. Prive Corp., 987 F.2d 324, 326-27 (5th Cir. 1993). The undisputed facts show that Salas has met his burden of establishing a prima facie case of age discrimination. However, the EEOC has proffered a

legitimate, non-discriminatory reason for not selecting Salas for the position of Budget Analyst. The EEOC contends that Salas was not selected because his interview went so badly. The EEOC states that Salas wandered off the subject during the interview and provided responses that were not relevant to the questions posed. Salas admitted in his deposition that his interview did not go well.

An employer meets its burden of production in employment discrimination cases by proffering admissible evidence of an explanation that would be legally sufficient to justify a judgment for the employer. Bodenheimer v. PPG Industries, Inc., 5 F.3d 955, 957 (5th Cir. 1993). The Court finds that the EEOC's proffered reasons for not selecting Salas for the position of Budget Analyst are legitimate and nondiscriminatory and therefore satisfy the EEOC's burden of production. Because the EEOC has articulated a legitimate nondiscriminatory reason for not selecting Salas for the position of Budget Analyst, the burden shifts back to Salas. In order to avoid summary judgment

against him, Salas must tender "factual evidence that would lead a jury to reasonably conclude that the (EEOC's) reasons are a pretext for age discrimination." Id. at 958.

The Court must therefore review the evidence offered by Salas to controvert the EEOC's justification for not selecting him for the position. The evidence Salas submits consists of his affidavit, his testimony, and the testimony of Oscar Garza. The Court will now review the specific points that Salas raises in his response to the motion for summary judgment.

First, Salas states in his affidavit that Limon told him that he had not contacted Salas' references before making his selection. This evidence is not probative or persuasive, however, since the EEOC had no obligation to contact Salas' references. The EEOC does not contend that Salas was rejected for the position because his references were not good. It contends that he was rejected because his interview went so poorly. It seems entirely reasonable that if Salas' interview went as poorly as 'asserted by the EEOC, there would be no point in

checking his references. Therefore, this argument does not lead to the conclusion that the proffered reason for not selecting Salas was pretextual.

Second, Salas states in his affidavit that he was the "highest qualified" candidate and that absent discrimination he should have been chosen for the position. The Court disagrees. First, the mere fact that Salas had a B.A. degree and Cavazos did not does not necessarily mean that he was more highly qualified for the position at issue. His degree was in sociology, and he has not demonstrated to the Court what relevance such a degree would have to a budget analyst position. Likewise, the fact that Salas was certified at the GS-5, GS-7, and GS-9 levels while Cavazos was certified only at the GS-5 level does not show that he was "more highly qualified" for the position. The EEOC was authorized to fill the position at the GS-5, GS-7, or GS-9 level. This Court does not believe that the ADEA imposes a requirement on the government to hire whatever applicant qualifies at the highest salary or grade level available for a particular position. "The ADEA was not intended to be a vehicle for

judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers." Id., at 959. Thus, Salas has shown neither that he was clearly the "highest qualified" candidate for the position, nor that the EEOC's proffered justification was a pretext for discrimination.

Salas states in his affidavit that Limon failed to review certain documents that Salas brought with him to the interview relating to his "credentials"; including two "certificates". one "Research and Its Uses". a "Project Evaluation", his B.A. degree, ratings from the Office of Personnel Management for administrative officer, a certificate for Certified Social Worker and "other vital documents". However, Salas fails to demonstrate how any of these additional documents were relevant to the position or, more importantly, to the interview. Many of these documents had already been made a part of Salas' initial application and were considered by the EEOC in selecting him for an interview along with the five other finalists. Contrary to showing that the EEOC's stated justification of a poor

interview was a pretext for discrimination, Salas' focus on these extraneous documents indicates to the Court that he may indeed have been unresponsive to the questions asked at the interview, electing instead to attempt to talk about irrelevant and/or superfluous documentation regarding his earlier academic work.

Salas also opines in his affidavit that Cavazos was not even minimally qualified for the job. Other than his own subjective belief, however, Salas produces no evidence to support this contention, and it is flatly contradicted by the evidence tendered by the EEOC. This argument is, therefore, also rejected.

Salas also states in his affidavit that Limon told 'him that he was not selected because they did not think he would be interested in a GS-5 position. Even assuming that Limon made this statement to Salas, the Court does not find that this uncorroborated statement is sufficient to meet Salas' burden of showing that the EEOC's articulated nondiscriminatory reason for not selecting Salas for the position was either untrue or a pretext for age

discrimination.

Salas testified and stated in his affidavit that Limon told other people that Salas had lied that his GS-13 rating was current. Oscar Garza testified that Limon told him that Salas "lied on his application." Salas admitted during his testimony, however, that the GS-13 rating that he originally gave to Limon was issued in 1984 and expired a year later. Salas also contends that a current GS-13 rating was among the documents he brought to the interview that Limon refused to review. The Court fails to see what relevance a GS-13 rating has to a position certified at the GS-5, 7, and 9 levels. The EEOC does not contend that Salas was not selected because his GS rating was not high enough. Further, Salas admitted that, because he only submitted an expired rating with his application, Limon had not seen his current GS-13 rating prior to making his selection. Therefore, because Salas represented to Limon that his rating was current but tendered an expired rating with his application, Limon reasonably might have believed that Salas had misrepresented his

credentials. Thus, Limon's purported statement does not lead to the conclusion that the EEOC's justification was a pretext for age discrimination.

Salas also points to Garza's further testimony that Salas told Garza that Limon told Salas that he was not selected because he probably wouldn't be interested in a GS-5 position. Setting aside the obvious hearsay problems with this "evidence", as the Court stated above, this statement is not sufficient to lead a jury to conclude that the EEOC's justification for not selecting Salas for the position was either untrue or a pretext for age discrimination.

Salas directs the Court's attention to Garza's testimony that his training with the EEOC has taught him to search for these types of inconsistent statements as evidence of unlawful discrimination. Even assuming that Garza was qualified as an expert to testify about this, Garza in fact testified that he tried to discourage Salas from filing suit because he didn't think he had a case. Therefore, this testimony adds nothing to Salas' argument.

Finally, Garza testified that at some

unspecified point in time, he heard an unspecified "supervisory person" make the comment, "You can't teach an old dog new tricks." Garza admitted, however, that it was neither Limon nor Esquivel who made the comment. Therefore, this evidence is also insufficient to meet Salas' burden.

In conclusion, the Court finds that Salas has failed to meet his obligation of submitting facts which, if believed, would show that it is more likely than not that the EEOC failed to select him for the Budget Analyst position because of his age. Therefore, the EEOC is entitled to judgment as a matter of law on this claim as well.

Sex Discrimination

Salas' summary judgment response concerning his sex discrimination claim is even weaker than that concerning his age discrimination claim. The only "fact" that he offers to show that he was not selected because of his gender is his own affidavit where he states that Limon "indicated a preference for a female for the job . . . " He does not tell the Court how Limon indicated that he preferred a female for the job, and does not cite to anything

else in the record to support this contention. Clearly, this selfserving, conclusory statement is insufficient to withstand summary judgment on Salas' sex discrimination claim.

Other Claims

To the extent Salas attempts to seek a remedy or assert jurisdiction in this case on grounds other than Title VII and the ADEA, the Court finds that such claims are barred. The exclusive remedy for individuals bringing claims of employment discrimination against the federal government is under Title VII and the ADEA. Rowe v. Sullivan, 967 F.2d 186, 189 (5th Cir. 1992).

Conclusion

In conclusion,, the Court finds that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law on all of the Plaintiff's claims. Accordingly, it is hereby ORDERED that the Plaintiff's Motion to Strike is DENIED.

It is further ORDERED that the Defendant's Motion for Summary Judgment is GRANTED and this case is hereby DISMISSED WITH PREJUDICE.

It is further ORDERED that all pending motions are hereby DENIED AS MOOT.

SIGNED and ENTERED this 23rd (handwritten) day of May (handwritten) 1994.

EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEAL

FOR THE FIFTH CIRCUIT

NO. 94-50379
Summary Calendar

PETE Q. SALAS,

Petitioner-Appellant, versus

TONY E. GALLEGOS, Chairman,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas
(SA-92-CV-522)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES:

Plaintiff- Appellant Pete Q. Salas ("Salas")

Plaintiff- Appellant Pete Q. Salas ("Salas") appeals the district court's judgment granting the summary judgment motion of Defendant-Appellee Tony E. Gallegos, Chairman of the Equal Employment Opportunity Commission ("EEOC"). We affirm.

FACTS AND PROCEDURAL HISTORY

In May 1986, Salas, a 59 year-old Hispanic male, was one of twenty-one applicants for the position of Budget Analyst in the San Antonio District office of the EEOC. Alfred Limon ("Limon"), the administrative Officer and Personnel Management Specialist in that office, reviewed the applications and selected six applicants, including Salas, for an interview. Victoria Cavazos ("Cavazos"), a 41 year-old Hispanic female, was also selected for an interview.

Salas was certified for the Budget Analyst position at the GS5, 7 and 9 levels. He had a bachelor's degree in sociology, and a professional certification in social work. Cavazos was certified at the GS-5 level only. She had prior work experience related to the functions of a Budget

Analyst at the Department of Housing and Urban Development, and she had eleven years of bookkeeping experience in the private sector. Cavazos did not possess a bachelor's degree, but she had taken a number of college courses, including two accounting courses.

Both Salas and Cavazos were interviewed. Salas's (sic) interview did not go well. Salas wandered off the subject and volunteered extraneous information not relevant to the questions asked of him. On the other hand, Cavazos's interview went very well, after which Limon recommended to Pedro Esquivel ("Esquivel"), Director of the San Antonio District office, that Cavazos be hired for the position. Esquivel concurred, and gave the position to Cavazos.

Salas filed a formal EEOC complaint on August 27, 1986. The EEOC investigated and found no discrimination. Salas then pursued his complaint through the administrative hearing process. The administrative law judge ("ALJ") determined that Salas had not been the victim of unlawful discrimination, and the EEOC adopted the ALJ's

recommended decision.

On May 20, 1992, Salas filed suit in federal court pursuant to Title VII and the ADEA, alleging that he had been discriminated against on the basis of gender, national origin and age. On October 15, 1993, the EEOC filed a motion for summary judgment, supported by summary judgment evidence, which included inter alia an assertion of a legitimate basis for not hiring Salas and for hiring Cavazos. The district court granted the EEOC's motion, concluding that Salas: 1) failed to make out a *prima facie* case of discrimination based on national origin because Salas and Cavazos were both Hispanic; 2) failed to present evidence that the EEOC's reason for not hiring him was a pretext for age discrimination; and 3) failed to present facts to show that he was not selected because of his gender. Final judgment was entered in favor of the EEOC and against Salas.

DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN, GENDER AND AGE

The central question in this case is whether the district court properly granted summary

judgment against Salas on his national origin, gender and age discrimination claims. We review the district court's summary judgment de *novo*. *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955, 956 (5th Cir. 1993). Summary judgment is appropriate when there exists no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56 (c) In making this determination, the Court must draw all justifiable inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

With regard to his claim of national origin discrimination, Salas argues that the court erroneously ruled that he failed to make a *prima facie* case because both he and Cavazos were members of the same protected class of persons. We agree. A *prima facie* case of national origin discrimination requires the petitioner to show that: 1) he belongs to a protected class; 2) he applied for a position for which he was qualified; 3) despite his qualifications, he did not receive the position; and

4) the position was filled by someone outside of the protected class. *Young v. City of Houston,* 906 F.2d 177, 180 (5th Cir. 1990) However, this Court has rejected the finding that hiring an individual of the same race as the petitioner necessarily defeats his *prima facie* case. *See Hornsby v. Conoco, Inc.,* 777 F. 2d 243, 246-47 (5th Cir. 1985) *E.E.O.C. v. Brown & Root, Inc.,* 688 F.2d 338, 340, & n.1 (5th Cir. 1982). It is sufficient to show that the employer filled the position with a person of the petitioner's qualifications. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). Because Salas has shown that he was a member of the protected class, that he applied for a position for which he was qualified, that despite his qualifications he did not receive the position and that the position was filled by someone with comparable qualifications, we find he has sufficiently met the requirements of a *prima* facie case of national origin discrimination.

However, we may still affirm the district court's summary judgment on alternative grounds. *See*

Vojvodich v. Lopez, 48 F.3d 879, 886 (5th Cir. 1995). Thus, we next address the question of whether the EEOC has proffered a legitimate, non-discriminatory reason for not selecting Salas for the position of Budget Analyst and whether, assuming the EEOC's reason is legitimate, Salas has presented evidence that the reason is a pretext for national origin discrimination. *See Bodenheimer*, 5 F.3d at 957.

The EEOC has maintained that the reason that Salas was not selected for the Budget Analyst position is because he performed poorly in his interview. For example, Salas wandered off the subject of the questions asked of him by Limon. Cavazos, on the other hand, answered the questions on point and in a professional manner. We find that the EEOC's reason for not selecting Salas is legitimate and non-discriminatory. Therefore, the EEOC has met its burden of production.

We find that Salas has failed to provide factual evidence that could lead a reasonable jury to conclude that the EEOC's reason for not hiring Salas is a pretext for national origin discrimination.

Bodenheimer, 5 F.3d at 958 (citing *St. Mary's Honor Ctr. v. Hicks*, ___ U.S. ____, 113 S. Ct. 2742, 2747, 125 L.Ed.2d 407 (1993)) . The testimony of Oscar Garza suggesting another distinct and arguably legitimate reason for the EEOC's decision not to hire Salas, along with Salas's self-serving and purely speculative conclusions regarding the EEOC's reasons for not hiring him, are insufficient to raise a genuine issue of material fact as to pretext; a reasonable jury would not be led to conclude that the EEOC's reason for not hiring Salas is a pretext for national origin discrimination. Accordingly, the district court did not err in granting the EEOC summary judgment as a matter of law on the claim of national origin discrimination. Likewise, we find that Salas has failed to meet his burden of persuasion with respect to raising a fact issue regarding the EEOC's asserted legitimate reason as a pretext for gender and age discrimination, and therefore, the district court did not err in granting the EEOC summary judgment on

Salas's gender and age discrimination claims.*

CONCLUSION

For the reasons articulated above, the judgment of the district court is AFFIRMED.

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*Salas also raises on appeal the district court's denial of four other motions: 1) to deem admitted requests for admissions; 2) to compel discovery; 3) for enlargement of time in scheduling order deadlines; and 4) to strike the EEOC's exhibits. We have considered the arguments advanced by Salas and find them wholly without merit.

5 U.S.C. 3311(1) (1993)

"Preference eligibles; examinations; crediting experience

In examinations for the competitive-service in which experience is an element of qualification, a preference eligible is entitled to credit--

(1) for service in the armed forces when his employment in a similar vocation to that for which examined was interrupted by the service; and

(2) for all experience material to the position for which examined, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he

received pay therefor.

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation. It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any

member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc. It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of

foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified

by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter. Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i)

or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or (3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, s 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as

of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection

in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

(j) Repealed. Pub.L. 99-592, s 3(b), Oct. 31, 1986, 100 Stat. 3342

(k) Date of adoption of system or plan

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Minimum age requirements; early retirement

benefits Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection

(a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in

section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above

is at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i) If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that

occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required to pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable

to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(1990)

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for

employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling

apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. s 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not

the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near

a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State,

section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining

party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the

Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. s 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter,

an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order

was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

CERTIFICATE OF SERVICE

The undersigned, an attorney, a member of the Bar of this Court, certifies that pursuant to Rule 29.3, Supreme Court Rules, he served the Petition for Writ of Certiorari on Counsel for the Respondent by enclosing a copy thereof in an envelope, with first class postage prepaid, addressed to counsel of record at his or her address:

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Department of Justice
Washington, D.C. 20530

and depositing same in the United States Post Office at San Antonio, Texas on September 18th, 1995, and further certifies that all parties required to be served have been served.

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QUESTIONS PRESENTED

1. Whether the district court erred in concluding that petitioner had presented insufficient evidence of national origin, sex, and age discrimination to survive a motion for summary judgment.

2. Whether the district court abused its discretion in refusing to consider petitioner's unsworn affidavits as evidence.

3. Whether petitioner's right to pursue a de novo action in federal court precludes a claim based on allegations of conflict of interest in the Equal Employment Opportunity Commission's administrative handling of a discrimination claim against itself as an employer.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-463

PETE Q. SALAS, PETITIONER

v.

GILBERT F. CASELLAS, CHAIRMAN,
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 69-77) is unpublished, but the decision is noted at 59 F.3d 1242 (Table). The opinion of the district court (Pet. App. 50-68) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 20, 1995. The petition for a writ of certiorari was filed on September 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner applied for a position as a Budget Analyst in the San Antonio District Office of respondent's agency, the Equal Employment Opportunity Commission.[1] Pet. App. 70. Petitioner, an Hispanic male, age 59, was one of six individuals selected for an interview. *Ibid.* The interviewing official recommended the hiring of another interviewee, Victoria Cavazos, a 41-year-old Hispanic female. *Id.* at 70-71. Cavazos was ultimately hired for the position. *Id.* at 71.

Petitioner filed a discrimination complaint with the Equal Employment Opportunity Commission. Pet. App. 71. The Commission investigated the complaint and found no cause. *Ibid.* Petitioner then pursued his complaint through the administrative hearing process. *Ibid.* The administrative law judge (ALJ) determined that petitioner had not been the victim of unlawful discrimination. *Ibid.* The Commission adopted the ALJ's recommended decision. *Id.* at 71-72.

Petitioner filed suit in federal court, alleging that he was rejected for the position because of his national origin, sex, and age in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (Title VII), and the Age Discrimination in Employment Act

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[1] This suit was brought against the Chairman of the Equal Employment Opportunity Commission in accordance with 42 U.S.C. 2000e-16(c) (1988 & Supp. V 1993), which provides that in an action brought by a federal employee or applicant for employment, "the head of the department, agency, or unit, as appropriate, shall be the defendant." When this case was decided in the district court, the Chairman of the Equal Employment Opportunity Commission was Tony E. Gallegos. Gilbert F. Casellas is the Commission's current Chairman.

of 1967, 29 U.S.C. 621 *et seq.* (ADEA). Pet. App. 72. The parties conducted extensive discovery. The district court, after permitting two discovery extensions, imposed a final discovery deadline. After that deadline had passed, petitioner filed a motion to compel production of certain documents. C.A. R.E. 518. The district court denied the motion to compel on the ground that it was not timely filed. *Ibid.*

Following discovery, respondent moved for summary judgment. Pet. App. 72. Respondent pointed to record evidence showing that petitioner was rejected because of his poor showing in the interview. *Id.* at 75. In response to the motion, petitioner asserted that he was more qualified than the candidate who was selected, because he held a B.A. degree and was qualified to work at a higher General Schedule (GS) level in government service. He also pointed to deposition testimony by an EEOC employee that the EEOC official responsible for filling the position had mentioned factors other than petitioner's performance at the interview in explaining why petitioner was rejected, namely, that petitioner had given him a GS-13 rating that had expired and that petitioner would probably not be interested in a GS-5 position. *Id.* at 60, 64-65. In addition, petitioner submitted certain self-styled "affidavits" that purported to show that the San Antonio District Office had a history of discrimination against older Hispanic males. *Id.* at 56. None of the affidavits was sworn or declared to be true under penalty of perjury. *Ibid.*

The district court granted the motion for summary judgment. Pet. App. 50-68. The court determined that petitioner could not make out a prima facie case of national origin discrimination because the position was filled by someone who "was also a member of the

protected class." *Id.* at 58. With respect to the claims of age and sex discrimination, the court concluded that petitioner had established a prima facie case. *Ibid.* The court held, however, that petitioner had failed to establish that respondent's stated reason for not selecting petitioner was pretextual. *Id.* at 60-61, 66. With respect to petitioner's claim that he was the "highest qualified" candidate for the job, the court noted that the EEOC was authorized to fill the position "at the GS-5, GS-7, *or* GS-9 level," so petitioner's B.A. degree and higher GS level did not "necessarily mean that he was more highly qualified for the position at issue." *Id.* at 61. The court further concluded that the fact that the EEOC hiring official had mentioned additional bases for not selecting petitioner was insufficient to establish that the EEOC's primary asserted reason, petitioner's performance at the interview, was pretextual. *Id.* at 64-65. The court refused to consider petitioner's unsworn "affidavits" because they were "neither sworn nor declared to be true under penalty of perjury" and, thus, were not "proper summary judgment evidence." *Id.* at 56.

2. The court of appeals affirmed. The court first ruled that the district court had erred in finding that petitioner could not make out a prima facie case of national origin discrimination. Pet. App. 73-74. Citing *Hornsby* v. *Conoco, Inc.*, 777 F.2d 243, 246-247 (5th Cir. 1985), the court noted that it was not necessary for petitioner to demonstrate that the position was filled by someone outside of the protected class in order to establish a prima facie case. *Id.* at 74. Although it disagreed with the district court on this point, the court of appeals nevertheless affirmed the district court's entry of summary judgment. *Ibid.* The court concluded that respondent had offered a

legitimate, non-discriminatory reason for not selecting petitioner—his poor performance in the interview—and that petitioner had "failed to provide factual evidence that could lead a reasonable jury to conclude that the EEOC's reason for not hiring [petitioner] is a pretext for national origin discrimination," *id.* at 75, or gender or age discrimination, *id.* at 76. The court also affirmed the district court's rulings on the various discovery-related issues raised by petitioner. *Id.* at 77 n.*.

ARGUMENT

1. Petitioner argues that the court of appeals "erred in affirming the district court's grant of summary judgment" because there were genuine disputes as to material facts. Pet. 16.[2] In support of this contention, petitioner raises a number of issues that are no longer in dispute in the case. He argues, for example, that the district court mistakenly concluded that "petitioner could not make out a *prima facie* case because the selectee was also an Hispanic." Pet. 24. In his brief on appeal, however, respondent acknowledged that petitioner had made out a prima facie case of national origin discrimination. Resp. C.A. Br. 4-5. The court of appeals agreed, finding that the district court had erred in concluding otherwise. Pet. App. 74. The court of appeals rejected petitioner's claims, not because of any failure of proof at the prima

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[2] Petitioner appears to have inverted the argument headings in his petition. Petitioner's arguments with respect to the granting of summary judgment are included under the heading that references the district court's exclusion of petitioner's "affidavit" evidence. Pet. 18. Petitioner's arguments on the exclusion of evidence are under the heading that speaks to the granting of summary judgment. Pet. 16.

facie stage, but because petitioner's evidence was insufficient to raise a question of fact on the issue of pretext.

Petitioner renews his claim that the evidence was sufficient to raise a question of fact on the issue of pretext. In support of that contention, he points to testimony that the EEOC official responsible for filling the position mentioned factors other than petitioner's performance at the interview as bases for the decision not to hire petitioner. Petitioner urges that those different factors establish that respondent's reliance on petitioner's performance at the interview is pretextual. Pet. 34. Petitioner is correct that "fundamentally different justifications for an employer's action," *Washington* v. *Garrett*, 10 F.3d 1421, 1434 (9th Cir. 1993), or "inconsistencies in * * * the decisionmaker's testimony," *Castleman* v. *Acme Boot Co.*, 959 F.2d 1417, 1422 (7th Cir. 1992), may raise a genuine issue of material fact on the issue of pretext. In this case, however, the court of appeals reviewed the record and determined that the additional and fully consistent factors mentioned by the decisionmaker "are insufficient to raise a genuine issue of material fact as to pretext." Pet. App. 76. That factbound determination does not merit review.

Petitioner also points to his qualifications, maintaining that he was "clearly best qualified" for the position and that that establishes pretext. Pet. 39-40. The district court, however, reviewed the requirements of the position being filled and the respective qualifications of petitioner and the applicant who was selected and found that petitioner's B.A. degree and higher G.S. level did "not necessarily mean that he was more highly qualified for the position at issue."

Pet. App. 61. No further review of that determination is warranted.

Petitioner further asserts that the "hiring policies of the San Antonio District office of the EEOC shows [*sic*] a history of age discrimination." Pet. 36. While petitioner may believe this to be the case, there is no record evidence to support such a contention.[3] The court of appeals applied the correct legal standards and determined that petitioner had presented no competent evidence of pretext. Nothing in the court's disposition merits Supreme Court review.

2. Petitioner contends that he "was erroneously denied admission of evidence at the trial court level which established age and national origin discrimination." Pet. 18. The evidence in question consisted of certain statements, offered in the form of "affidavits," that were "neither sworn nor declared to be true under penalty of perjury." Pet. App. 56. The district court, acting within its discretion, disregarded the unsworn statements. See *Nissho-Iwai American Corp.* v. *Kline*, 845 F.2d 1300, 1305-1306 (5th Cir. 1988) (citing to "settled rule" that affidavits must either be sworn or made under penalty of perjury to be proper summary judgment evidence).

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[3] Petitioner complains that he "would have been able to clearly show the gross statistical imbalance against persons within his protected group" had the district court "ordered the Commission to answer petitioner's discovery as fully as they [*sic*] should have." Pet. 14. The district court denied petitioner's discovery request because it was filed outside the discovery deadline set by the court, which had already been extended on two occasions. C.A. R.E. 518; Resp. C.A. Br. 13. The court acted well within its discretion in cutting off discovery.

Petitioner suggests that the affidavit evidence should have been accepted by the court because the various statements were "submitted via a Bill of Exceptions at the administrative hearing." Pet. 18. This case, however, was brought as a de novo action in federal court. See 42 U.S.C. 2000e-16(c) (1988 & Supp. V 1993); 29 U.S.C. 633a(c). The court was not reviewing an agency decision or deciding the case on the basis of an administrative record. Petitioner, as the non-moving party in the district court, was obligated to produce competent evidence "that would support a jury verdict." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Petitioner failed to meet his evidentiary burden.

3. Finally, petitioner maintains that "[t]he agency created an inherent and substantial conflict of interest by acting as both the respondent and the appellate authority at the administrative stages of this case." Pet. 2. Both Title VII and the ADEA provide individuals with a de novo right of action in federal court. That right of action is the sole remedy for any alleged errors in the Commission's handling of an administrative complaint. See, *e.g.*, *Scheerer* v. *Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991), cert. denied, 505 U.S. 1205 (1992); *Ward* v. *EEOC*, 719 F.2d 311, 313-314 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984); *Gibson* v. *Missouri Pacific R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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